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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 264.

THE LAFLIN AND RAND POWDER COMPANY, PLAINTIFF IN ERROR,

vs.

GOTTLIEB F. BURKHARDT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 21, 1875.

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The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Laflin and Rand Powder Company, a corporation duly organized under the laws of the State of New York, and a citizen thereof, having its usual place of business in the city, county, and State of New York, plaintiff, and Gottlieb F. Burkhardt, of Boston, in said district of Massachusetts, defendant, in an action of tort, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October current, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

2 Circuit court of the United States, district of Massachusetts, *ss:*

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of October, A. D. 1874.

[SEAL.] JOHN G. STETSON,
Clerk.

The defendant in error hereby acknowledges due and sufficient service of the foregoing writ of error and of a citation issued thereon entitling said writ to be entered in the Supreme Court of the United States, at the October term thereof, A. D. 1874.

G. F. BURKHARDT,
By his att'ys, BURKE, EASTON & FIELD.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four:

Before the honorable Nathan Clifford, associate justice.

THE LAFLIN AND RAND POWDER COMPANY, a corporation duly organized under the laws of the State of New York, and a citizen thereof, having its usual place of business in the city, county, and State of New York, plaintiff,
v.
GOTTLIEB F. BURKHARDT, OF BOSTON,
4 in our district of Massachusetts, defendant.
} In an action of tort.

And the plaintiff says the defendant has converted to his own use the goods mentioned in the schedule hereto annexed, the property of the plaintiff, to the damage of the said plaintiff, as it says, the sum of nine thousand dollars.

Schedule annexed.

26,391 pounds of nitric acid.
2,841 pounds of sulphuric acid.
18,362 pounds of glycerine.
18,362 pounds of vitriol.
1,082 pounds of saltpetre.
190 pounds of nitrate of soda.
3,200 pounds of prepared pulp.
1,400 pounds of unground pulp.
1,040 pounds of raw pulp.

The writ in this cause is dated the fifteenth day of September, A. D. 1873, and was entered at the October term of this court, A. D.
5 1873, when and where the parties appeared, by their respective counsel, and thence the cause was continued to this present term, when, to wit, May 15, 1874, the following answer is filed, namely:

Defendant's answer.

And now comes the defendant, and for answer denies each and every allegation in plaintiff's writ and declaration contained.

By his attorney,

JOHN B. GOODRICH.

On the nineteenth day of September, A. D. 1874, the following agreement is filed, namely:

Agreement.

The parties in the above-entitled action hereby waive a trial by jury and consent that the issues of fact may be tried and determined by the court.

HURD & NETTLETON, *for Plaintiff.*
JOHN B. GOODRICH, *for Defendant.*

This cause is thereupon set down for hearing, and fully heard before
the honorable George F. Shepley, circuit judge, holding said court,
6 and after due deliberation thereon had, it is considered by the
court, to wit, Sept. 19, 1874, that the said Laflin and Rand Powder Company, plaintiffs, take nothing by their said writ, and that the said Gottlieb F. Burkhardt, defendant, recover of the said Laflin and Rand Powder Company, plaintiff, his costs of suit, taxed at

Upon the trial of said cause, after the evidence was closed on both sides, and before judgment was entered, the said Laflin and Rand Powder Company presented its bill of exceptions, which was signed and allowed by the court, and is in the words and figures following, namely:

Bill of exceptions.

Circuit court of the United States, district of Massachusetts.

LAFLIN AND RAND POWDER COMPANY
v.
GOTTLIEB F. BURKHARDT.

7 This is an action of tort in the nature of trover. The pleadings are made part of this bill of exceptions.

At the trial the plaintiffs introduced evidence that they entered into a written contract with Carl Dittmar, under which said Dittmar was to manufacture dualin at his factory at Neponset in Massachusetts, as therein provided. A copy of said contract is hereto annexed and made part of this bill of exceptions.

The plaintiffs further introduced evidence tending to show that all the goods mentioned in the pleadings were raw materials used in the manufacture of dualin. That on the first day of February, 1872, the said goods were in the possession of said Dittmar at his said factory for the purpose of being so manufactured under said contract. That the greater part of said raw material had been procured and paid for by the plaintiffs and had become their property, and afterwards were furnished
8 and delivered by them to said Dittmar upon his requisition therefor, to be manufactured under said contract; that the balance of said raw materials had been purchased by said Dittmar to be manufactured as aforesaid, with money furnished him by the plaintiffs, upon Dittmar's requisition therefor, under said contract, which requisition specified the amount required for each bill; that while the said raw materials were at said factory to be manufactured into dualin, under said contract, the defendant procured and directed the same to be sold upon an execution which had issued against Dittmar, in which execution the defendant was the judgment creditor, and the defendant bought said raw materials at the sheriff's sale upon said execution; and that afterwards and before the bringing of this action the plaintiffs demanded the same of the defendant.

The plaintiffs further introduced evidence tending to show that in the accounts between them and said Dittmar, all the raw materials
9 when delivered by plaintiffs to Dittmar were charged in the plaintiffs' books, together with the other expenses of the manufacture, to "dualin account," and said account was credited with the sales of dualin, and with the stock on hand, including the raw materials which Dittmar had at his factory; that Dittmar kept no book of charges, but kept a manufacturer's journal in which was entered the materials as they

were received by him, as well those delivered by plaintiffs as those purchased by himself, and he rendered the plaintiffs a monthly return of the raw materials on hand at his factory, and a return so rendered January 1st, 1872, included all the goods mentioned in the pleadings. The plaintiffs also introduced evidence of the value of the goods and offered to show that the defendant had knowledge of said contract and knew that said goods were furnished thereunder.

At the close of the plaintiff's evidence the plaintiff requested the judge to rule that the raw materials furnished and delivered by them to said Dittmar, as aforesaid, remained the property of the plaintiffs, and that the raw materials purchased by Dittmar with the money furnished by plaintiffs, as aforesaid, were also the property of the plaintiffs; but the judge declined so to rule, and did rule as matter of law that under the provisions of said contract the raw materials procured and furnished by the plaintiffs became the sole property of said Dittmar as soon as the same were delivered to him, and were liable to be taken for his debts, and that the raw materials purchased by Dittmar with the money furnished him therefor by the plaintiffs upon his requisition as aforesaid, were also the property of Dittmar, and directed judgment to be entered for the defendant.

To the aforesaid rulings and refusals to rule, the plaintiffs being aggrieved thereby, except, and pray that their exceptions may be allowed.

By their attorneys.

HURD & NETTLETON.

The foregoing exceptions having been duly taken, and being found conformable to the truth, are allowed, as of Sept. 19, 1874, before entry of judgment.

Witness my hand and seal this first day of October, A. D. 1874.

[SEAL.] G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

Agreement July 4, 1871. *Carl Dittmar and Laflin & Rand Powder Company.*

This memorandum of agreement made and entered into by & between Carl F. W. E. Dittmar, of Boston, in the State of Massachusetts, party of the first part, & the "Laflin & Rand Powder Co.," a corporation formed and existing under and by virtue of the laws of the State of New York, party of the second part, witnesseth as follows:

Whereas the said party of the first part is the inventor and true discoverer of the explosive compound called by him "dualin," for which & relating to which he has obtained three several letters-patent of the United States of America, to wit, number 98854, granted on the 18th day of Jan'y, A. D. 1870, for "improvement in explosive compounnds"; number 99069, granted on the 25th day of Jan'y, A. D. 1870, "for an improved explosive agent called xylogdoline;" and number 99070, granted on the 25th day of Jan'y, A. D. 1870, "for an improvement in the manufacture of xyloglodine, & other explosive agents;" which three several letters-patent are now the property of the said party of the first part;

And whereas the said party of the first part is now engaged in the manufacture & production of "dualin" at Neponset, Mass., and whereas the said party of the second part desires to obtain, in connection with the said party of the first part, the sole & exclusive right to use & sell to others said "dualin":

Now, therefore, in consideration of the premises & of the mutual agreement of the said parties, as hereinafter set forth on the part of each, the said parties do hereby covenant and agree as follows, viz:

First. The said party of the first part agrees to manufacture & produce said "dualin" in suitable packages & cartridges, as required by the said party of the second part, from time to time, in quantities sufficient to supply the demand for the same, and all sales of the
13 same produced & effected by the party of the second part, it being fully understood and agreed that the said party of the first part has the sole & exclusive right to manufacture "dualin," except as hereinafter modified, & that the said party of the second part has the sole & exclusive right to sell such dualin under said letters-patent, and such sole & exclusive rights are hereby granted, fixed & determined as aforesaid.

Second. The dualin manufactured & put up by the party of the first part under this agreement for sale by the party of the second part shall be of the best quality in all respects, and shall be packed in cartridges and packages to the satisfaction of the party of the second part, & according to its directions, by and through its executive officers.

Third. All the goods manufactured by the said party of the first part shall be consigned to the said party of the second part for sale,
14 and all orders for explosives given to or received by said party of the first part, are to be turned over and transferred to the party of the second part to be filled by it.

Fourth. The said party of the second part hereby accepts the said sole & exclusive right of sale of said *of* dualin, and engages to enter into the business of selling the same to the best of its power and ability, the principal design being to create a demand for the use of dualin, and to control the same for the joint interest of the parties concerned.

Fifth. The nett profits arising from such sales, shall be divided equally, share & share alike, between the said parties, & shall consist of the difference between the actual cost of manufacture & the nett proceeds of sales. Such cost of manufacture to include transportation to New York, but neither in such cost of manufacture or expenses of sale shall be included any charge for rent or use of buildings, storage
15 on the premises of the parties, or insurance, other than marine insurance actually paid, or personal commissions, and no sales shall be made at less than eighty (80) cents per lb. unless by consent of both parties.

Sixth. Any & all losses by explosion or otherwise, shall be borne equally by the said parties so far as loss of the crude material or dualin is concerned, but the party of the second part assumes no risk on the buildings or machinery of the manufacturer.

Seventh. Regular books of account, containing regular entries of all the matters pertaining to this agreement & the carrying out of the same in detail, shall be kept by the said parties respectively, and free access shall be had to the same at all reasonable times by both of said parties, or their legal representatives, & statements shall be made, embracing all the particulars above mentioned in full, so that the nett profits can be ascertained by both parties from time to time, as and when re-
16 quired by either, but not oftener than once in three months. In all the statements & accounts rendered & made out for the purpose of ascertaining the amount of the nett profits shall be verified under oath by the party making or rendering the same, provided such requisition is desired by the other party. A division of nett profits shall be made as above stated every three months.

Eighth. The said party of the first part hereby guarantees the validity of the said three letters patent, and agrees to defend the same, and to protect the said party of the second part in the rights hereby granted, and save them harmless in defending the same from any & all infringements thereof. The costs and damages of any suits in such protection or defence to be equally shared. The party of the first part agrees to pay the party of the second part, at the expiration of the contract, the half part of the costs belonging to the party of the second part, with interest annually.

17 Ninth. This agreement is binding upon the heirs, administrators, executors, successors and assigns of the said parties, and shall continue during the term of ten years, and in case the party of the first part shall make any new invention or discovery in explosives or explosive compounds, or any improvements therein or relating to the same in the matter of the explosion of the same, or otherwise, the provisions of this agreement shall apply thereto in all respects the same as though incorporated therein at the beginning.

Tenth. In case of the default on the part of the said party of the first part, or his failure to comply with & carry out the provisions of this agreement on his part, according to the true intent & meaning thereof, the said party of the second part shall have, & in that case the party of the first part hereby grants to the party of the second part, the license & right to manufacture dualin under said letters patent for the aforesaid term of ten years, & to sell the same, subject to the pro-

18 visions of this contract, or to the division of nett profits, & in order to provide for such case the said party of the first part covenants & agrees to teach some person, to be named by the said parties & mutually agreed upon, the practical method of manufacturing dualin, in all the particulars & manipulations thereof, to the best of his knowledge & ability, so that the person above referred to may understand the same fully & practically in all respects.

Eleventh. The party of the second part shall sell no other explosive compound than said dualin and common gunpowder, & such other explosives as may be manufactured by said party of the first part during the term aforesaid of this agreement, unless it shall be in the interest of both parties.

Twelfth. The party of the second part shall advance to the party of the first part, on his requisition therefore, for the purposes of paying salaries, for labor, for incidental expenses of manufacture, &

19 for his personal account, semi-monthly, an amount for salaries, one hundred dollars; for labor, two hundred dollars, if necessary; for his personal account two hundred & fifty dollars, & such further reasonable sums as may be required for incidental expenses of manufacture, & shall also procure & furnish to the party of the first part on his requisition all the new materials needed to manufacture said explosives in quantities sufficient to supply the demand created by the party of the second part, or the money necessary for the purchase thereof, the said advances & the cost of such new material to be charged to said party of the first part against the manufactured goods to be consigned to the party of the second part as above provided.

In witness whereof the said parties have hereunto set their respective

hands & seals this fourth day of July, A. D. [illegible]
one.

CARL DITTMAR. [L. S.]
LAFLIN & RAND POWDER CO.,
ALBERT T. RAND, *Pres.*

Witness:
MARIA DITTMAR, as to C. D.
JOEL GOLDTHWAIT, as to A. T. R.

20 A true record.
Attest: JOHN G. STETSON, *Clerk.*

21 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of The Laflin and Rand Powder Company, plaintiff, v. Gottlieb F. Burkhardt, defendant, in said circuit court determined.

In testimony whereof I, John G. Stetson, clerk of said circuit court, hereunto subscribe my name and affix the seal of said court, at Boston, in said district, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] JOHN G. STETSON, *Clerk.*

22 *Bond on writ of error.*

Know all men by these presents that we, The Laflin and Rand Powder Company, a corporation duly organized under the laws of the State of New York, as principal, and Joel Goldthwait, of Boston, and George H. Sampson, of Medford, both in the district of Massachusetts, as sureties, are held and firmly bound unto Gottlieb F. Burkhardt, of Boston, in the district of Massachusetts, in the full and just sum of five hundred dollars to be paid to the said Burkhardt, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, in a suit depending in said court between said Laflin and Rand Powder Company, plaintiff, and said Gottlieb F. Burkhardt, defendant, judgment was rendered against the said Laflin and Rand Powder Company, and the said Laflin and Rand Powder Company having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Burkhardt citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, there to appear on the third Monday of said term of said Supreme Court:

Now, the condition of the above obligation is such that if the said Laflin and Rand Powder Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

LAFLIN & RAND POWDER CO., [L. S.]
——— ———, *Pres.*
JOEL GOLDTHWAIT. [L. S.]
G. H. SAMPSON. [L. S.]

Signed, sealed, and delivered in presence of—
A. W. HIGGINS.

This bond may be approved.

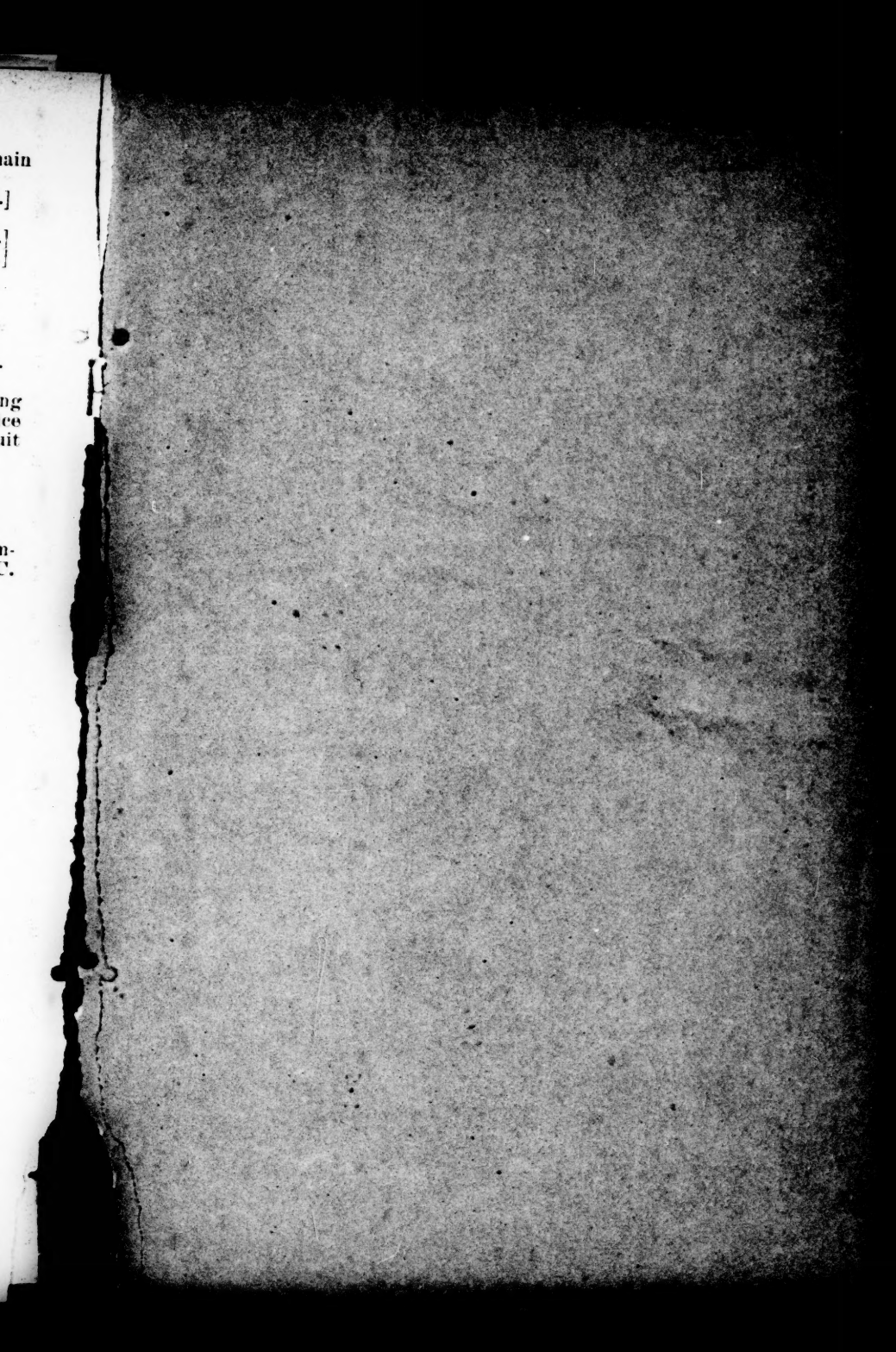
J. B. GOODRICH, *Att'y.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 264. The Laflin and Rand Powder Company, plaintiff in error, vs. Gottlieb F. Burkhardt. Massachusetts C. C. U. S. Filed 21st October, 1875.



IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1877.

No. 264.

THE LAFLIN AND RAND POWDER COMPANY,

Plaintiffs in Error,

v.

GOTTLIEB F. BURKHARDT.

In Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The question involved in this record is the construction of a written contract, — a copy of which is contained in pages 11 to 20, — made between the plaintiffs in error, a corporation having their place of business in the city of New York, and there engaged in the manufacture and sale of powder and other explosives, of the one part, and Carl Dittmar, the inventor and patentee of an explosive called dualin, and engaged in its manufacture at Neponset, Massachusetts, of the other part. Under this contract the plaintiffs in error furnished said Dittmar, at Neponset, with certain materials described in the declaration, to be manufactured into dualin, which dualin, when manufactured by Dittmar, was, under the contract, to be sent to the plaintiffs in the city of New York, to be sold by them, and the net profits were to be equally divided between the plaintiffs and Dittmar. While the said materials were in Dittmar's possession for the purpose of being so manufactured under said contract, and before they were manufactured by him into dualin, the defendant, a judgment creditor of Dittmar, levied his execution upon them, in satisfaction of his debt, claiming said materials to be the property of Dittmar. This action of tort, in the nature of trover, was brought by the plaintiffs in error against the defendant for the alleged conversion of said materials in so levying upon them under his execution against Dittmar. And the question is, whether, under said contract, any or all of said materials remained the property of the plaintiffs after their delivery to Dittmar. The materials were of two classes; by the terms of the contract (clause 12th, p. 19) the plaintiffs were to procure and furnish Dittmar with the

materials themselves, or with the money necessary for the purchase thereof; they did both. The greater part of the materials described in the declaration had been procured and paid for by the plaintiffs, and had become their property, and afterwards were furnished and delivered by them to Dittmar, to be manufactured under said contract; the balance had been purchased by Dittmar, to be manufactured as aforesaid, with money furnished him therefor by the plaintiffs. At the trial in the Circuit Court for the District of Massachusetts, at the close of the plaintiffs' evidence, the plaintiffs claimed, and requested the Court to rule (p. 10), that the raw materials furnished and delivered by them to Dittmar remained the property of the plaintiffs; and that the materials purchased by Dittmar with the money furnished him therefor by the plaintiffs were also the property of the plaintiffs; but the Court declined so to rule, and did rule, as matter of law, that under said contract the raw materials procured and furnished by the plaintiffs became the sole property of Dittmar as soon as the same were delivered to him, and were liable to be taken for his debts, and that the raw materials purchased by Dittmar with the money furnished him therefor by the plaintiffs upon his requisition under said contract were also the property of Dittmar, and directed judgment to be entered for the defendant. The plaintiffs excepted to the rulings given, and to the rulings refused, and sued out this writ of error for their revision.

ASSIGNMENTS OF ERROR.

It is submitted that the Court below erred,—

1. In refusing the ruling requested by the plaintiff (p. 10), "that the raw materials furnished and delivered by them to said Dittmar as aforesaid, remained the property of the plaintiffs."

2. In giving the ruling (p. 10), "as matter of law, that under the provisions of said contract, the raw materials procured and furnished by the plaintiffs, became the sole property of said Dittmar as soon as the same were delivered to him, and were liable to be taken for his debts."

3. In refusing the ruling requested by the plaintiff (p. 10), "that the raw materials purchased by Dittmar, with the money furnished by the plaintiffs as aforesaid, were also the property of the plaintiffs."

4. And in giving the ruling (p. 10), "that the raw materials purchased by Dittmar with the money furnished him therefor by the plaintiffs, upon his requisition as aforesaid, were also the property of Dittmar."

ARGUMENT.

I.

The first and second assignments of error may be considered together. They relate to the materials purchased and paid for by the plaintiffs in error, and delivered by them to Dittmar to be manufactured by him into dualin, under the contract. As to these, it is claimed by the plaintiffs in error, that they remained their property after delivery to Dittmar; and that the contract between themselves and Dittmar was a bailment of the raw material, and not a sale or barter.

The question involved, turns upon the construction of the written contract between the plaintiffs and Dittmar. This contract is of a class which has not unfrequently been before the courts for construction, in which one party furnishes raw materials to be manufactured into a new form, and then the the identical materials delivered are to be restored in a new and manufactured condition, to be sold by the party furnishing the materials, and both parties compensated out of the

proceeds. It is submitted, in order to ascertain under this class of contracts, whether title to the materials passes to the manufacturer, the test is, whether the identical materials delivered are to be restored; if so, the contract is one of bailment, and the title to the materials is not changed, the contract for restitution of the specific articles delivered, being inconsistent with a change of title; but when the manufacturer is under no obligation to restore, in a new and manufactured form, the identical materials delivered, and is at liberty to transfer a manufactured article made of other materials than those delivered to him, the title passes and the manufacturer becomes a debtor therefor. This principle is elementary, is stated in all the text-books, and applied in numerous adjudged cases; controversies arise only in its application.

Thus, Sir William Jones, in his Essay on Bailments, page 102, says, "It may be right, also, to mention, that the distinction before taken in regard to loans, between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in contracts of *hiring* and *depositing;* in the first case, it is a regular *bailment;* in the second, it becomes a debt. Thus, according to Alfenus, in his famous law, on which the judicious Bynkershœk has learnedly commented: 'If an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape;' the smith may consequently apply it to his own use; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any un-

common metal, according to the whim of the owner, were agreed to be *specifically* redelivered in the form of a cup or a standish."

In Kent's Com. 589, it is said, "But though he [the bailee] must exercise a care, diligence and skill adequate to the business, and if he fails in the ordinary care and skill which belongs to his undertaking, and the bailor sustains damage, he must answer for that damage; yet if the delivery was of a nature to transfer the property, a different result would follow. In the case of a delivery to a goldsmith of a bar of silver to be made into vases, or of an ingot of gold to be made into rings, by the civil law, the whole property passed to the smith, and the employer was merely entitled, as a creditor, to have metal equally valuable returned in a certain shape. If the metal in that case should be lost, even by irresistible force, the smith, as the owner of it, would be held to bear the loss, and the creditor to be entitled to his vase or ring; *though it would be otherwise if the same metal was to be returned in its new form.*"

Story on Bailments, § 439: "The distinction between the obligation to restore the specific things, and the obligation to return other things of the like kind, and equal in value, holds in cases of hiring as well as in cases of deposits and gratuitous loans. In the former case, it is a regular bailment; in the latter it becomes a debt or innominate contract." See also ibid. § 283.

The test between a bailment and a sale is stated with great clearness by BRONSON, C.J., in *Mallory* v. *Willis*, 4 Comst. 85, in these words: "The distinction which will be found to run through all the authorities, with the exception of two cases, which have been overruled, is this: when the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to

the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale."

The reported cases, in which this test has been involved, are much more numerous in this country than in England; but a recent application of it there is contained in *South Australian Ins. Co.* v. *Randall*, Law Rep. 3 P.C. 101, which was a controversy whether the delivery by farmers to a miller of a lot of corn was a bailment or a sale; and the question discussed and decided by the Court was whether the miller was bound to redeliver the identical corn; and in the solution of which, they relied largely upon the American authorities.

This rule is applied without reference to the diversity of change which the material undergoes in the process of manufacture; it does not matter how complete the transmutation may be, so long as the material can be traced, and the product identified with it. Edwards on Bailment, page 340. The most common illustrations have been the conversion of gold or silver into plate or jewelry, wheat into flour, logs into boards, boards into wooden ware, hides into leather, leather into shoes, cotton or woollen yarn into cloth. In *Judson* v. *Adams*, 8 Cush. (Mass.) 556, it was applied to the materials for manufacturing glass bottles, and other glassware; in *King* v. *Humphreys*, 10 Barr. (Penn.) 217, it was applied to rags from which paper was manufactured; and in *Smith* v. *James*, 7 Cow. (N.Y.) 328, where corn was manufactured into whiskey.

In applying this test between a bailment and a sale, difficulties have often been encountered by courts to determine whether, in the particular contracts under consideration, the

manufacturer was bound to restore, in its original or in an altered form, the specific materials delivered. Thus, in *Mallory* v. *Willis*, 4 Comst. (N.Y.) 76, and *Foster* v. *Pettibone*, 3 Seld. (7 N.Y.) 433, dissenting opinions were delivered, but the judges differed only in respect to the question whether, in the contracts there under consideration, the miller was bound to deliver flour ground from the identical wheat delivered; all concurred that if he was so bound no property in the wheat passed to him. Now in the contract between the plaintiffs and Dittmar, it plainly appears, by express provisions, and from the subject matter of the contract, that Dittmar was to restore to the plaintiffs, in the form of dualin, the specific materials procured and furnished him by the plaintiffs. Thus, in the twelfth clause of the contract (p. 19), the plaintiffs were to "procure and furnish to the party of the first part, on his requisition, all the new* materials *needed to manufacture said explosives*, in quantities sufficient to supply the demand created by the party of the second part." The plaintiffs were to furnish materials "*needed to manufacture said explosives;*" here was an express and specific purpose from which Dittmar, in his use of the materials, had no right to depart; Dittmar was not to sell the materials or apply them to any other use than explosives, and the explosives when so manufactured were to be returned to the plaintiffs, for, by the third clause of the contract (p. 14), it was provided that "*all the goods manufactured* by said party of the first part. shall be consigned to the said party of the second part for sale." The first, second, four and fifth

* In the copy of the contract transmitted, a clerical error was made in the twelfth clause by writing "new" for "raw;" the word is "raw" in the original contract. As this mistake has only recently been discovered, and as the plaintiff regards it of no legal importance whether the adjective is "new" or "raw," no application is made, which would involve delay, for its correction.

clauses of said contract also, by clear and necessary implication, show the same obligation.

The subject matter of the contract also clearly shows the obligation of Dittmar to return to the plaintiffs, in the form of dualin, the identical materials furnished and delivered by them to him. The recitals show Dittmar to be the inventor of dualin, for which he had obtained Letters Patent, and by this contract he grants to the plaintiffs the sole and exclusive right, under his patents, to sell the same, even covenanting, in its third clause, to turn over to the plaintiffs, to be filled by them, all orders for dualin received by him, thereby agreeing himself not to sell; and by the first clause of the contract reserves to himself the sole and exclusive right to manufacture dualin under the patents. The plaintiffs, by the twelfth clause of the contract, agreed to furnish Dittmar all the money and materials needed in the manufacture; and by the eleventh clause, they agree to sell no other explosives, except common gunpowder, than dualin, and such other explosives as Dittmar may manufacture. Thus showing, as the very basis of the contract, that Dittmar was to turn over to the plaintiffs all the dualin made by him out of the materials furnished by the plaintiffs.

This contract also steers clear of a difficulty which has often embarrassed contracts of this class, arising from the intermixture and commingling of property, such as where many persons bring their corn or wheat to the same miller to be ground, and other like cases; here no such difficulty arises, for the plaintiffs were to furnish *all the money and materials needed for the manufacture*, and Dittmar was to send them *all the dualin and explosives he manufactured therefrom;* and the parties mutually covenanted to exclude all other business, except the plaintiffs were allowed to sell common gunpowder. Here, therefore, was no intermixture or

commingling of the materials of various owners, which might have occurred if Dittmar was manufacturing dualin for the public.

An examination of this contract in detail, it is submitted, leads to the same conclusion, that the identical materials delivered by the plaintiffs to Dittmar are by him to be manufactured into dualin and returned to the plaintiffs, and that a bailment and not a sale was intended between the plaintiffs and Dittmar. Though of course the rule of construction is to interpret the entire instrument, and not merely disjointed or particular parts of it, the whole context and agreement is to be considered in collecting the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause. Chitty on Contr. 83.

After giving the parties, the contract proceeds with a recital of three Letters Patent issued to Dittmar, concluding with the recital that Dittmar is engaged in the manufacture of dualin, and saying that the plaintiffs desire to obtain, in connection with said Dittmar, the sole and exclusive right to use and sell to others said dualin. The recital relates only to the Letters Patent and the rights thereunder, as one of the subjects of the contract, and is thus made the first and prominent object of its provisions.

The first half of the first clause of the contract, and the second clause of the contract, may be consider together, as they relate to the same or kindred subjects; in the first clause Dittmar agrees to manufacture and produce dualin in suitable packages and cartridges, as required by the plaintiffs, in quantities sufficient to supply the demand produced by the plaintiffs, and in the second clause of the contract Dittmar agrees that the dualin manufactured and put up by him shall be of the best quality, and shall be packed in cartridges

and packages to the satisfaction of the plaintiffs, and according to its directions.

Is there anything in these clauses inconsistent with the plaintiffs' continued ownership of the materials delivered by them to Dittmar? Dittmar agrees to manufacture said dualin in suitable quantities, packages and cartridges, as required by the plaintiffs, and that it shall be packed to their satisfaction and according to their direction. This gives the plaintiffs control of the quantity to be manufactured, and the form in which it shall be packed for market. In *Denny* v. *Cabot*, 6 Met. (Mass.) 82, one Cooper agreed to manufacture satinets out of materials furnished by Cabot, Appleton & Co., "of such colors and style as required by Cabot, Appleton & Co." In the opinion of the Court (p. 89), Mr. Justice WILDE says, "The agreement was that Cooper should manufacture satinets for Cabot, Appleton & Co., on the terms stipulated. The stock was to be supplied by the latter, and the satinets were to be of such colors as they should direct, and, when manufactured, were to be delivered to them. The satinets were therefore, unquestionably, the property of Cabot, Appleton & Co." In that case the Court regarded the three facts, (1) that the stock was supplied by Cabot, Appleton & Co.; (2) that they were to direct the colors of the satinets, and (3) that the goods, when manufactured, were to be delivered to them, as sufficient to establish the property, beyond question, in Cabot, Appleton & Co. These facts exist in the contract now under consideration: (1) the plaintiffs supplied the material and directed the quantity of dualin to be manufactured; (2) the dualin was to be in packages to the satisfaction of and according to the direction of the plaintiffs; and (3) was to be delivered to them.

In the second clause of this contract, Dittmar agrees that the dualin manufactured by him shall be of the best quality

in all respects; this also is consistent with the plaintiffs' continued ownership of the materials. In *Mallory* v. *Willis*, 4 Comst. (N.Y.) 76, a miller, who received wheat to be ground into flour, agreed *inter alia*, "to guaranty the inspection of said flour;" the question before the Court was whether there was a sale or bailment of the wheat, and it was argued to be inconsistent with a bailment for the defendant to guaranty that flour made of the plaintiffs' wheat should bear inspection; but the Court answered, "It seems but reasonable that the defendants should have been required so to manufacture it, as that the flour would bear inspection," and held the contract to be one of bailment. It seems reasonable here, that the plaintiffs should require a covenant on the part of Dittmar, that the costly materials, by them delivered to be manufactured by a patent process into a patent article, should be returned in a salable condition.

The latter part of the first clause recurs again to the patent, and provides that Dittmar has the exclusive right to manufacture, and the plaintiffs the sole and exclusive right to sell, dualin under the Letters Patent, thus dividing two of the rights under the Letters Patent, the patentee reserving to himself the exclusive right to manufacture, and granting to the plaintiffs the exclusive right to sell.

The third clause provides that all the goods manufactured by Dittmar shall be consigned to the plaintiffs for sale, and that Dittmar is to turn over to the plaintiffs, to be filled, all orders received by him. So far as this clause shows that Dittmar is to return to the plaintiffs, in the form of dualin and other explosives, the materials delivered to him, it has already been noticed. But the language that all the goods "shall be consigned to said party of the second part for sale," is supposed to imply ownership on the part of Dittmar. It may be argued that the word "consigned" implies a con-

signor and a consignee, and ownership by the consignor. The word "consigned" is repeated in the twelfth clause. In *Schenck* v. *Saunders*, 13 Gray (Mass.) 37, the plaintiffs, merchants in New York, made an agreement with one Howe in Massachusetts, by which the plaintiffs were to furnish certain stock of leather, and Howe was "to take the stock, and make it up to the best of his abilities into women's boots; and further agrees to *consign* all the goods he makes to the said Schenck, &c., to be sold by them on a commission of five per cent," &c. It was argued in that case that the word "consign" imported ownership in Howe, the manufacturer: but the Court said (p. 41), "In connection with the subject matter, we think this means only that he will send them back to them for sale, when manufactured;" and held the title did not pass to Howe. The word "consign" is not a technical word and has no technical meaning; one of its synonymes is "to send." In *Schenck* v. *Saunders* the contract also provided that the manufactured goods were to be sold by the plaintiffs "on a commission of five per cent; the goods to be sold for cash, and the returns made to the said Charles Howe as fast as made," which provision as clearly indicated ownership by Howe as the use of the word "consign." In the cases at bar, by the fifth clause of the contract no commissions were to be charged.

The third clause of the contract also provides for the "sale" of the manufactured goods by the plaintiffs; and the same provision is found in other parts of the contract. It may be argued this indicates that the plaintiffs were merely selling-agents of Dittmar and of Dittmar's property. It has been already noticed that this dualin was a patented composition of which Dittmar, under his Letters Patent, had the exclusive right to make sale, and this right, under the patents, Dittmar would have, whoever owned the materials of

which the patented composition was made. This exclusive right was granted by him to the plaintiffs, and is mentioned in the recital as one of the principal objects of the contract. The reference in this third clause of the contract, as well as in the first, second, fifth and other clauses, to the fact that the manufactured goods are to be sold by the plaintiffs, refers, not to *title* of the goods, and imports nothing as to whether the contract between the plaintiffs and Dittmar, respecting the raw materials, was a bailment or a sale, but it refers to the right granted under the Letters Patent, which was *to sell* the goods. The plaintiffs had no occasion to use dualin, they had no right to manufacture it, and its sale was the only application to which it could be put. Moreover, selling explosives was the plaintiffs' business, and of course that was the purpose for which dualin was manufactured by Dittmar and delivered to the plaintiffs, and it was from the sales that both parties were to be compensated; so that, if the dualin had not been patented, provisions in the contract for its sale would not override a settled legal test by which a bailment is distinguished from a sale. A contract by a man to sell goods does not imply that he is not the owner of them. In all the following cases, the contracts provided that the party furnishing the raw material should sell the manufactured goods, yet the contracts respecting the materials were held to be bailments, and not sales.

Mallory v. *Willis*, 4 Comst. (N.Y.) 76.
Hyde v. *Cookson*, 21 Barb. (N.Y.) 92.
Barker et al. v. *Roberts*, 8 Greenl. (Me.) 101.
Denny et al. v. *Cabot et al.*, 6 Met. (Mass.) 82.
Judson et al. v. *Adams*, 8 Cush. (Mass.) 556.
Schenck v. *Saunders*, 13 Gray (Mass.) 37.

By the fourth clause of the contract the plaintiffs accept

the right granted under the Letters Patent, and covenant to sell the goods to their best ability for the joint interest of the parties. This clause is further commented on hereafter.

The fifth clause of the contract provides that the net profits from the sales shall be equally divided, and specifies how, in some respects, the net profits shall be determined.

In some of the cases under manufacturing contracts the question has been raised whether the parties were copartners by reason of sharing the profits. The decisions have generally been that no copartnership was created. See *Denny* v. *Cabot*, 6 Met. (Mass.) 82; *Judson* v. *Adams*, 8 Cush. (Mass.) 556. In the case at bar the plaintiffs, being a corporation, it is settled, both in New York and Massachusetts, that a copartnership as to them is *ultra vires*. *Sharon Canal Co.* v. *Fulton Bank*, 7 Wend. (N.Y.) 412; *Whittenton Mills* v. *Upton*, 10 Gray (Mass.) 584. The fifth clause provides for deducting the "cost of manufacture" in ascertaining the net profits. It will be noticed by the twelfth clause of the contract that all the expenses of manufacture are to be advanced by the plaintiffs, and by the fifth clause they are to reimburse themselves for the materials out of the sales. The reported cases show a great variety in the provisions for compensation of the parties under manufacturing contracts; in most of them these provisions have been much more suggestive of title in the manufacturer than in the case at bar, but these provisions have never been regarded as decisive of the ownership of the raw materials.

In *Barker et al.* v. *Roberts*, 8 Greenl. 101, before cited, the contract was to saw logs into boards, and the manufacturer was to receive all the boards should "net over seven dollars per thousand;" the contract was held to be one of bailment.

In *Mallory* v. *Willis*, 4 Comst. 76, before cited, the

contract was to manufacture wheat into flour, and the miller was to deliver 196 pounds of flour for every four bushels and fifteen pounds of wheat, and to be paid sixteen cents per barrel, and two cents extra in case the plaintiffs made one shilling net profit on each barrel of flour. The contract was held to be a bailment.

In *Pierce* v. *Schenck*, 3 Hill (N.Y.) 28, logs were delivered under a contract that the miller should saw them into boards, and each party was to have one half the boards; this was held to be a bailment of all the logs.

In *Foster* v. *Pettibone*, 3 Seld. (N.Y.) 433, wheat was delivered to be ground, and the miller was to deliver one barrel of flour for each five bushels of wheat. It was shown that it required four and a half bushels of wheat to make one barrel of flour; thus the miller received one half a bushel out of every five. This was held to be a bailment.

In *Hyde et al.* v. *Cookson et al.*, 21 Barb. (N.Y.) 92, hides were delivered by the plaintiffs to a tanner; the plaintiffs were to have five per cent commission on the cost, and charges for buying, and six per cent commission and guarantee for selling the leather. When the plaintiffs had sold the leather, the net proceeds of sales, after deducting cost of hides and expenses, commissions on hides and leather, interest, insurance, and all other expenses, was to be the profit or loss to accrue to the tanner in full for tanning. This was held to be a bailment of the hides.

In *King* v. *Humphreys*, 10 Barr. (Penn.) 217, rags were delivered at five cents per pound, to be manufactured into paper, for which the manufacturer was to receive a note on six months, at the rate of ten cents per pound. This was held a bailment.

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facturer was to receive a certain number of cents per yard for the wool, and one third of the net profits, after deducting a charge of commission and guaranty on gross sales of six per cent, and all premiums, insurance, transportation and expenses, with interest. It was held, the manufacturer had no title to the materials, or share of the satinets, nor any lien thereon.

In *Judson et al.* v. *Adams*, 8 Cush. (Mass.) 556, the plaintiffs agreed to furnish a manufacturer such materials as were required for manufacturing glass, the manufacturer to receive all the profits after deducting the cost of all materials furnished, and incidental expenses, together with ten per cent on the sales of the ware manufactured. The Court held that no property in the materials passed to the manufacturer, and said (p. 562), "The question hardly seems to be an open one."

In *Schenck* v. *Saunders*, 13 Gray (Mass.) 37, the plaintiffs furnished leather to be made into boots; the boots to be sold by the plaintiffs on a commission of five per cent, the profits to be returned to the manufacturer. It was held, title in the stock did not pass to the manufacturer.

In *Mansfield* v. *Converse*, 8 Allen (Mass.) 182, stock was delivered to be made into brogans, to be returned at eighty-seven and a half cents per pair; the value at which the brogans were to be returned included both the materials and the cost of manufacturing. It was held, the title to the materials did not pass to the manufacturer.

From these cases it is clear that, whether the manufacturer is compensated for his labor by receiving a portion of the raw materials, or a portion of the manufactured goods, or a fixed sum, or a part or even the whole of the net profits, is of no importance in determining the title to the materials;

the test always being whether or not the identical materials are to be returned in a new and manufactured form.

The fifth clause also shows how the plaintiffs are to be reimbursed for the cost of the raw material furnished Dittmar under the contract. They are to deduct this cost out of the proceeds of the sales. Dittmar is not to pay to the plaintiffs the cost of materials.

The sixth clause of the contract provides that any and all losses by explosion, or otherwise, shall be borne equally by the said parties, so far as loss of crude material or dualin is concerned. This clause, it may be argued, implies joint ownership of the material and dualin; but it is submitted that the insertion of this clause necessarily implies the parties are not joint owners, for if they were, the clause would be superfluous, as the loss of joint owners, by operation of law, must be borne equally. This clause is useless unless the material and dualin is the sole property of one of the parties, and it is equally consistent with the sole ownership of either.

In *Barker* v. *Roberts*, 8 Greenl. 101, already cited, the contract was by Cowan & Oaks to saw logs furnished by the plaintiffs. The contract provided: "It is understood that the said Cowan & Oaks risk the logs after they are scaled, and risk the boards after the logs are sawed, until they are marketed." The Court, in the opinion delivered by WESTON, J., say (p. 104), "Much stress has been laid upon the express stipulation that the logs and the boards should be at the risk of Cowan & Oaks, and this, it is urged, is an essential and decisive criterion of the right of property. And doubtless it is where the *risk is a deduction of law*, for it is then, except in the case of common carriers, and perhaps in a few other special cases, an effect and consequence of the right of property. The former results from the latter. But it is otherwise where the *risk arises from the express*

agreement of the parties. It is *expressed* because it would not be *implied*. Nothing is more common than for one to take the risk of another's property. With certain qualifications, the law imposes it upon common carriers. What led to this provision in the contract under consideration, does not appear; but it does not afford evidence of a change or transfer of the logs from the plaintiffs. It was a matter of convention, as was the engagement on the part of the plaintiffs that they would charge no commissions for their services."

If an express agreement that the manufacturer shall assume the whole risk of the raw material and manufactured goods, is not evidence of a change of title, an express agreement to divide the risk is not more cogent. It might have been inserted to insure greater care on the part of Dittmar.

The seventh clause of the contract relates to the manner of ascertaining the net profits, and contains nothing bearing upon the title to the materials.

The eighth clause relates to the Letters Patent, and contains nothing material to the present question, except the provision that the costs and damages of any suit, in protecting and defending the Letters Patent, shall be equally shared, which may be considered as a fair offset to the division of risk upon the crude material and dualin contained in the sixth clause. It might as well be argued from this clause that the Letters Patent were the joint property of the parties, as that the crude material and dualin was joint property by virtue of the sixth clause.

The ninth clause is believed to be unimportant in the present case.

The tenth clause of the contract provides that, in case of default on the part of Dittmar to carry out the provisions of this agreement, the plaintiffs shall have the "right to manu-

facture dualin under said Letters Patent for the aforesaid term of ten years, and to sell the same, subject to the provisions of the contract, or to the division of the net profits," &c. In the contingency provided for in this clause, it seems too plain for argument that the raw materials and dualin would be the plaintiffs' property, yet they are to manufacture and sell "subject to the provisions of the contract;" and it hardly could be subject to the contract if, under the contract, the raw materials are the property of Dittmar; and, in the event mentioned in this clause, the materials are the property of the plaintiffs.

By the eleventh clause, the plaintiffs agreed to sell no other explosive compound than said dualin and common gunpowder, and such other explosives as might be manufactured by Dittmar. This is correlative to the third clause of the contract; Dittmar was to consign to the plaintiffs all the goods he manufactured, and the plaintiffs were to devote themselves exclusively to selling them, with the exception of common gunpowder.

The twelfth and last clause of the contract is an important one, and is believed to be that upon which the defendant in part relies as establishing his construction. By this clause the plaintiffs in error were to advance all the cash required by Dittmar for the expenses of manufacture; the items specified are, semi-monthly, one hundred dollars for salaries, two hundred dollars for labor, and two hundred and fifty dollars for Dittmar's personal account, making in all eleven hundred dollars a month, and thirteen thousand two hundred dollars a year, of which six thousand dollars was for Dittmar's personal account; and, besides these specified sums, they were to advance such further reasonable sums as might be required; add to this cash all the raw material which was also to be furnished by the plaintiffs, and it appears that the

entire expense of the manufacture was advanced and paid for by the plaintiffs, except rent for Dittmar's factory, as by the fifth clause neither party was to charge for rent or use of buildings or storage. Thus the plaintiffs were, in fact, carrying on this business and furnished all the capital, leaving nothing for Dittmar to do but to perform the proper labor of a manufacturer.

The plaintiffs were to procure and furnish to Dittmar all the materials needed to manufacture said explosives, in quantities sufficient to supply the demand created by the plaintiffs; and when the explosives were manufactured they were to be returned to the plaintiffs for sale, and the net profits equally divided. This is wholly inconsistent with a sale or transfer of the materials. Dittmar could hold the materials delivered to him only for the single purpose of working or using them in the manufacture of explosives, which, as soon as finished, were to be returned to the plaintiffs, and they were entitled, immediately upon the completion of the explosives, to be repossessed of their property. Dittmar was, therefore, a mere bailee for hire.

The concluding sentence is, the said advances of cash, and cost of such material, "to be charged to said party of the first part against the manufactured goods to be consigned to the party of the second part, as above provided." This language, it may be argued, indicates a sale of the materials; but the expenses and cost of the material is not charged to Dittmar personally, to be paid by him as his own proper debt; they are charged to the party of the first part, *against the manufactured goods* to be consigned to the plaintiffs for sale. When the sales of the manufactured goods are made by the plaintiffs, they, by the fifth clause of the contract, are to deduct out of the proceeds the cash advanced and the costs of the materials, in order to ascertain the profits. Dittmar is

never to pay the plaintiffs for the materials; they are to reimburse themselves out of the proceeds of the sales. The words "*to the party of the first part*," following the word "*charged*," qualified as these words are by the context, and by the other clauses, have no legal meaning at all, because they impose no personal debt upon Dittmar. The legal effect is the same as if the contract read, the said advances and cost of material "to be charged against the manufactured goods, to be consigned to the party of the second part as above provided;" "and as above provided," the plaintiffs were to look to the proceeds of the sales alone, to reimburse their said advances and cost of material. This provision is to be construed in connection with the fifth and seventh clauses of the contract, providing for ascertaining the profits, and keeping regular books of account; and so the parties acted upon it, as appears in the record, page 9: "The plaintiffs further introduced evidence tending to show that, in the accounts between them and said Dittmar, all the raw material, when delivered by plaintiffs to Dittmar, were charged in the plaintiffs' books, together with the other expenses of the manufacture to '*dualin account*,' and said account was credited with the sales of dualin, and with the stock on hand, including the raw materials which Dittmar had at his factory; that Dittmar kept no book of charges, but kept a manufacturer's journal, in which was entered the materials as they were received by him, as well those delivered by the plaintiffs, as those purchased by himself, and he rendered the plaintiffs a monthly return of the raw material, on hand at his factory, and a return so rendered January 1, 1872, included all the goods mentioned in the pleadings." This mode of business was in exact conformity with the contract; the raw materials were charged to "dualin account," not to Dittmar personally, and the plaintiffs looked to the credit side of that account for

reimbursement, not to Dittmar. The credit side contained proceeds of the sales of dualin and the raw material which Dittmar returned as at his factory, but no cash paid by Dittmar for the materials.

Suppose at the end of a year, after the plaintiffs had advanced $13,200 cash for salaries, labor and Dittmar's personal account, and also many thousand dollars' worth of raw materials which had been duly manufactured into dualin and returned to them and sold, there was found to be a loss on the material of $10,000: could the plaintiffs call upon Dittmar to make good this loss? Would not Dittmar's decisive answer be that he was only obliged to manufacture the identical materials into dualin, and return them for sale by the plaintiffs, and was not bound by the contract to pay the plaintiffs in money for the materials? But it may be argued that Dittmar was to pay for the materials in manufactured goods: the conclusive answer to such an argument is, that where the manufactured goods are to be made out of the identical materials received by the manufacturer, the law stamps the transaction as a bailment, and not as a sale or barter.

It will be noticed the contract is wanting the distinguishing feature of a sale, a price for the materials, unless the cost of the materials to the plaintiffs is the price to Dittmar, which seems an unreasonable construction, and would require the plaintiffs to invest thousands of dollars in these materials and sell them to Dittmar at cost and without adding even a commission.

The effect of the word "consigned" has been considered under the third clause of the contract.

In *Hyde et al.* v. *Cookson*, 21 Barb. 92, the contract was for tanning hides into leather, and contained these words: "Said hides to be insured and *charged* to said O. by H. &

E." This, it was argued, indicated a sale, and that O. became a debtor for the hides. The Court, say, "The hides were to be insured and charged to O., and this also is thought to manifest an intent to sell. I do not see this provision in that light. Even the literal sense of the expression does not favor the defendant's interpretation, for it is the hides that are to be charged, and not the price at which they were sold to O., or purchased for him. They were to be charged to him as evidence of their delivery for the purposes of the contract, and to insure their return, which is consistent with the idea that he received them as bailee and manufacturer, and not as purchaser and owner." In *Hyde* v. *Cookson* the sentence did not conclude as here, "against the manufactured goods," which repels the idea of a personal debt.

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reimbursement, not to Dittmar. The credit side contained proceeds of the sales of dualin and the raw material which Dittmar returned as at his factory, but no cash paid by Dittmar for the materials.

Suppose at the end of a year, after the plaintiffs had advanced $13,200 cash for salaries, labor and Dittmar's personal account, and also many thousand dollars' worth of raw materials which had been duly manufactured into dualin and returned to them and sold, there was found to be a loss on the material of $10,000: could the plaintiffs call upon Dittmar to make good this loss? Would not Dittmar's decisive answer be that he was only obliged to manufacture the identical materials into dualin, and return them for sale by the plaintiffs, and was not bound by the contract to pay the plaintiffs in money for the materials? But it may be argued that Dittmar was to pay for the materials in manufactured goods: the conclusive answer to such an argument is, that where the manufactured goods are to be made out of the identical materials received by the manufacturer, the law stamps the transaction as a bailment, and not as a sale or barter.

It will be noticed the contract is wanting the distinguishing feature of a sale, a price for the materials, unless the cost of the materials to the plaintiffs is the price to Dittmar, which seems an unreasonable construction, and would require the plaintiffs to invest thousands of dollars in these materials and sell them to Dittmar at cost and without adding even a commission.

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the rights of the owner of the goods and the rights of the patentee. Under this contract the patentee parted with and assigned to the company furnishing the materials all his right under his patent to sell the patented article, which removes any supposed difficulty arising under the patent.

In *Atkinson et al.* v. *Bell et al.*, 8 Barn. & Cressw. 277, the question was whether there had been a sale of certain patent machines manufactured for the defendants. The machines were manufactured out of the machine maker's own materials by direction of Key, the patentee. The Court, in deciding whether enough had been done to constitute a sale from the machine maker to defendants, say, "This case is not affected by the argument that these are patented articles, because they might have been delivered to a third person with Key's [the patentee] assent." Although the patentee's assent was necessary to authorize a sale or use of the machine, yet the Court, in *Atkinson* v. *Bell*, apply the same common-law test to determine the title to the patented machine which is applicable to articles not patented. BAYLEY, J., says, "Then as to the counts for work and labor: if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the product of his labor and your materials to any other person. Having bestowed his labor, at your request, on your materials, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person."

Although certain passages in the opinion in *Atkinson* v. *Bell* have been subjected to criticism in respect of whether certain contracts are contracts for the sale of goods under the 17th section of the St. of Frauds, or contracts for

work and labor done and materials furnished, the case is now fully recognized in *Lee* v. *Griffin*, 1 B. & S. 272. (See Benjamin on Sales, Am. ed. § 99; Eng. ed. pp. 78, 79.) And the case has never been questioned upon the point to which it is now cited.

Contracts which a patentee makes to share them with third persons are interpreted and enforced in the same manner as other legal engagements. *Morse et al.* v. *O'Reilly et al.*, 6 Penn. Law Journ. 501, was an application in the U.S. Circuit Court for special injunction by patentees of Morse's telegraph, on the ground of breach and forfeiture of a contract respecting the construction of a line of telegraph.

KANE, J., says (p. 509), "It does not vary the effect of his agreement that the subject matter of it regarded a patent right. The exclusive rights of a patentee are specially guarded from intrusion; but the contracts which he makes to share them with third persons are interpreted and enforced just as other legal engagements."

Wilson v. *Sandford*, 10 How. 99, was a bill in equity brought to set aside a contract granting permission to use or vend a patent machine; and the question was whether the appellant could appeal from a decree of the Circuit Court, under the 17th section of the act of 1836, in relation to actions arising under any law of the United States granting to inventors the exclusive right to their inventions. The Court, say, "Now the dispute in this case does not arise under any act of congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out the contract stated in the bill. And there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles."

In *Sawin* v. *Guild*, 1 Gall. 485, it was held by Mr. Jus-

tice STORY that the sale of the *materials* of a patented machine, by a sheriff on an execution against the owner and patentee, did not subject him to an action for an infringement of the patent right.

III.

In *Dittmar* v. *Norman*, 118 Mass. 319, the Supreme Court of Massachusetts were called upon to construe this same contract. In that case Dittmar brought an action against Norman for the price of certain dualin, manufactured from materials furnished him by the Laflin & Rand Powder Company under the present contract. Norman defended, upon the ground that the dualin was not the property of Dittmar, but was the property of the Powder Company. The Court held the dualin was the property of Dittmar. The testimony given by Dittmar in that case, — that the contract had been broken by the Powder Company, — does not seem to have been relied on by the Court in deciding the main question, and the alleged breach of contract would not operate to divest the title of the company and vest it in Dittmar.

It is respectfully submitted that in *Dittmar* v. *Norman*, the Court failed to apply the true legal test; viz., whether, by the contract, Dittmar was to return dualin to the Powder Company made from the identical materials delivered to him. The Court seem to have fallen into the error, condemned by Mr. Justice BRONSON in *Mallory* v. *Willis*, 4 Comst. 76, of determining the case upon mere verbal distinctions between the contract under consideration, and those of a kindred nature which had previously been before the same Court. Mr. Justice BRONSON, in *Mallory* v. *Willis*, after discussing the language of the contract in that case, says, "If decisions are made to turn upon mere verbal distinctions

where there is no difference in principle, we shall soon have a multitude of cases, but no general rules." And the principle he had stated in the same opinion, as applicable to this class of contracts, was, that if the identical materials delivered were to be restored, although in an altered form, the contract was a bailment; but if the receiver was at liberty to restore another thing, the title was changed. The Court, in *Dittmar* v. *Norman*, do not seem to have considered this principle, or to have applied this test.

The first ground upon which the Court, in *Dittmar* v. *Norman*, places its judgment is, that the purpose of the contract was to secure to Dittmar facilities in the way of advances in cash and material for the manufacture of dualin patented by him, and on the part of the Laflin & Rand Powder Company, to secure the exclusive selling agency of the same. The general purpose of affording facilities to the manufacturer is common to all this class of contracts, but throws little light in determining whether the contract is a bailmeht or a sale. For, whichever it is, Dittmar was only to perform the labor of a manufacturer, and was to receive in payment one half the profits. The purpose to secure to the Laflin & Rand Powder Company the exclusive selling agency related to the patent rights, and not to the title to the materials. This has been already discussed in the brief.

The next ground is that the company agreed to supply Dittmar, upon his requisition, with cash and raw material in advance, "to be charged to him" against manufactured goods "consigned" to them for sale. This is based upon the twelfth clause of the contract, which has already been considered. The Court do not seem to have considered that Dittmar was not to pay for the material charged to him, but the plaintiffs were to pay themselves therefor out of the proceeds of the sales. Under such circumstances, charging the materials to

Dittmar was a mere form, and had no legal effect to impose a debt upon him. And the words "charged to him" do not, by any inflexible technical effect, operate to transfer title to Dittmar, in opposition to the established and fundamental test between a sale and a bailment. The provision that the materials were to be furnished Dittmar "on his requisition therefor," was inserted because he, being the patentee and manufacturer, was presumed to know the quantities and qualities of materials needed to manufacture the required amount of dualin. It does not give him control of the business; the control is given, by the second and twelfth clauses of the contract, to the Powder Company.

The next clause of the contract to which the Court refer is the fourth, in which the Laflin & Rand Powder Company accept the rights granted under the patent, and engages to enter into the business of selling dualin to the best of its ability, and concludes with declaring: "the principal design being to create a demand for the use of dualin, and to control the same for the joint interest of the parties concerned." This is a mere recital, declaring the object of the contract in general terms. The words "joint interest" here used do not refer to any joint title, either in patent rights, raw materials or dualin. It refers to the joint beneficial interest which each party equally has in the net profits. A contract must be so construed as to effectuate the purpose and design for which it is entered into. Looking at the purpose and design of this contract, stated by the Court in *Dittmar* v. *Norman*, as being to secure to Dittmar facilities in advances of cash and material for the manufacture of dualin, and to the Laflin & Rand Powder Company the exclusive selling agency of the same, and for the joint interest of both parties to create and control a demand therefor, it is not necessary, to carry out these purposes, that title to the raw material should vest in

Dittmar; on the contrary, it would seem to be a useless and vain form to have the property pass. The Powder Company must supply all the raw material, Dittmar must manufacture it, and return the product to them; they have, by the contract, the exclusive right to sell this product. It is not necessary, to effectuate these purposes, that title to the raw material should pass.

The Court, in *Dittmar* v. *Norman*, next refer to the facts that the Letters Patent were the property of Dittmar, as well as the building and machinery required in the manufacture. If Dittmar had reserved to himself the monopoly, under his patent, of selling dualin, that might be some reason for construing a contract that was uncertain and ambiguous in its terms, so as to vest title to the materials in the party who had the monopoly of selling. This contract is not uncertain or ambiguous, but is clear and positive, that the dualin is to be made from the identical materials furnished by the Powder Company, and the exclusive right to sell the dualin is granted to them. It would be incongruous to vest title to the materials in Dittmar, who, by the contract, must make them into dualin, which, by the contract, he cannot sell. It is harmonious and sensible to vest title to the materials and dualin in the party to whom is granted the monopoly of selling. We have already shown that contracts respecting patent rights and articles, are construed by the general rules of the common law.

The fact that Dittmar owned the building and machinery, has no tendency to give him title to the raw materials he manufactured. Land may draw to itself title to buildings erected thereon; but the ownership of a factory and machinery does not draw to itself title to raw materials manufactured.

The Court further says, "All the other provisions of the

contract are consistent with [Dittmar] the plaintiff's sole ownership of the materials advanced and charged to him, and with the interest of the company as selling agents of [Dittmar] the plaintiff only." The fallacy of this statement consists in its implication of a presumption in favor of Dittmar's title. The presumption is the other way. A state of facts or title once shown to exist, is presumed to continue until the contrary is shown. All the materials procured and furnished by the Powder Company were, at the time of delivery, their property, and that title is presumed to continue until the contrary is shown. As to the company being selling-agents, we have already argued that the clauses in the contract, respecting the sale of dualin, relate to the grant patent rights, and the means whereby both parties were to realize profits, and not to the title of the materials.

The provisions of the contract are not consistent "with the interest of the company as selling-agents of [Dittmar] the plaintiff only." To constitute an agency the principal must have legal capacity to appoint an agent. A man cannot appoint an agent to do an act which it is legally impossible for the principal to do. By this contract Dittmar had incapaciated himself from appointing a selling-agent. In the first and third clauses of the contract, he granted to the company the sole and exclusive right to sell dualin under the Letters Patent, and this was accepted by them in the fourth clause. How, then, can it be said the company were only selling-agents of Dittmar, when Dittmar himself had no authority to sell?

The only consistent construction to put upon this contract, is to construe the delivery of materials to Dittmar as a bailment, and thereby vest title to the dualin in the company, who alone had authority, under the Letters Patent, to carry out the purpose of the contract by selling it. And no iso-

lated words, or disjointed phrases, are sufficient to control this harmonious and consistent interpretation of the whole instrument.

The case of *Hutchins* v. *Ellis*, 12 Gray (Mass.) 449, cited in *Dittmar* v. *Norman*, has no bearing at all upon the present question. In *Hutchins* v. *Ellis*, two parties agreed that one should furnish lumber, and the other should manufacture it into doors and blinds, be allowed a price therefor, and manage the business of selling them, and divide the profits with the first party. After the defendant had received the money for sales the plaintiff brought an action at law for his share of the profits, and was met by the objection that the parties were partners, and the remedy in equity. The Court held the parties not to be partners *inter sese*, but no question was raised, considered or alluded to as to who owned the lumber, or the doors and blinds.

The Court conclude the opinion in *Dittmar* v. *Norman*, with saying, "It is true the word 'consign' alone was held in *Schenck* v. *Saunders*, 13 Gray, 37, not to imply a title to the goods in the manufacturer, when controlled in its common meaning by the other provisions of the contract as applied to the subject matter. It is not so controlled in the contract now in question. The other provisions here show that the word was used in its obvious and common meaning, implying title in the consignor." The meaning of the word "consign" was controlled in *Schenck* v. *Saunders* only because the contract there showed the manufacturer was to manufacture the stock furnished him, return it for sale, and receive the proceeds, deducting the value of the stock and five per cent on the sales. In *Schenck* v. *Saunders* the Court say, "In the first place, taken in the most favorable view for the defendant, the agreement is uncertain and ambiguous in its terms, and it may be said to be doubtful

whether it is a contract of sale, or only an agreement to supply Howe with stock to be manufactured by him for the plaintiffs. If this be so, then, as the stock originally belonged to the plaintiffs, the title to it is not shown to have passed out of them by the agreement."

"But in the next place, we are of opinion that this agreement is not a contract of sale. The plaintiffs use no words which necessarily or by implication indicate an intent to part with their title. And there is wanting in the agreement the distinguishing feature of a sale, a price for the goods, or a stipulation by which the price can be fixed." "The true interpretation of the contract seems to be that it was an agreement by which Howe agreed to manufacture the stock for the plaintiffs, and to receive from them, as his pay therefor, the proceeds of the sales of the goods, when manufactured and returned to them for sale, deducting the value of the stock and a commission of five per cent on the sales. The only clause in the agreement which militates with this construction is that by which Howe agrees to 'consign' the goods to the plaintiffs for sale. But in connection with the subject matter, we think this means only that he will send them back to them for sale, when manufactured." This language is as applicable to the contract between the plaintiffs in error and Dittmar as to that in *Schenck* v. *Saunders*, and leads to the same conclusion. The same reasons control the meaning in the present case. The materials originally belonged to the Powder Company, and are not shown to have passed out of them; no price or promise to pay for them is fixed; and the materials were to be manufactured, returned, sold, and their cost deducted.

We have examined the opinion of the Court in *Dittmar* v. *Norman* with particularity, because it presents an instance, not of the misapplication of an admitted principle, but the

Court there seems to have entirely overlooked the legal test between a bailment and a sale, which has always been considered decisive, and already has been stated in the brief. This test is applied in the following cases, most of which have been before cited: —

South Australian Insurance Co. v. *Randall*, Law Rep. 3 P.C. 101.
Barker v. *Roberts*, 8 Greenl. (Me.) 101.
Smith v. *Jones*, 7 Cow. (N.Y.) 328.
Pierce v. *Schenck*, 3 Hill (N.Y.) 28.
Mallory v. *Willis*, 4 Comst. (N.Y.) 76.
Foster v. *Pettibone*, 3 Seld. (N.Y.) 433.
Hyde v. *Cookson*, 21 Barb. (N.Y.) 92.
King v. *Humphreys*, 10 Barr. (Penn.) 217.
Stevens v. *Briggs*, 5 Pick. (Mass.) 177.
Denny v. *Cabot*, 6 Met. (Mass.) 82.
Judson v. *Adams*, 8 Cush. (Mass.) 556.
Schenck v. *Saunders*, 13 Gray (Mass.) 37.
Mansfield v. *Converse*, 8 Allen (Mass.) 182.
Buffum v. *Merry*, 3 Mason, 478.

In *Buffum* v. *Merry*, Mr. Justice STORY applied this test to a contract respecting the manufacture of plaids, in which he held that the contract did not require the goods to be made of the specific yarn delivered. After citing Sir William Jones, Mr. Justice STORY says, "In such a case, the only question is, whether the specific ingot is to be wrought up into the urn, or any other ingot of equal value. If the former, it is a bailment; if the latter, a contract for making and delivering an urn, in consideration of receiving an ingot of silver, and the payment of the expenses of workmanship."

In Story on Bailments, § 439, after giving the case of *Buffum* v. *Merry*, the author says, "But if A and B had

agreed to have the particular yarn, with filling to be found by B, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials: and the plaids, before the division, had been burnt by an accidental fire, the loss would have been (it should seem) mutual, each losing the materials furnished by himself."

IV.

The third and fourth assignments of error may be considered together. These relate to materials purchased by Dittmar with money furnished him therefor by the plaintiffs in error. As the quantity and value of these were very small, the question is of slight practical importance. Dittmar was required to state in his requisition the material needed, and the money was sent him to be expended for those specific goods: it was therefore sent upon a trust, and the material, when purchased, became the property of the plaintiffs in error, as in any case of goods purchased by a contractor or agent for, and with the funds of, another.

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